BEST AVAILABLE COPY

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

OPINIONS AND JUDGMENTS BELOW.....2

STATEMENT OF THE CASE.....2

SUMMARY OF THE ARGUMENT.....3

ARGUMENT.....5

I. *POWERS V. OHIO / BATSON V. KENTUCKY*.....5

II. *TEXAS YOUTH COUNCIL REPORT*.....8

III. *PENRY - DISRUPTIVE CHILDHOOD*.....11

IV. *PENRY - VOIR DIRE CONSIDERATION OF YOUTHFULNESS*.....12

CONCLUSION.....14

APPENDIX

Order setting submission date
by Court of Criminal Appeals.....A-1

TABLE OF AUTHORITIES

CASES — PAGE

Batson v. Kentucky, 476 U.S. 79,
106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).....3,5,6,7

Black v. State, ___ S.W.2d ___
(Tex.Cr.App. Slip Op. No. 69,648,
delivered May 28, 1991).....8n

California v. Brown, 479 U.S. 538,
107 S.Ct. 837, 93 L.Ed.2d 934 (1987).....11

Cordova v. State, 733 S.W.2d 175
(Tex.Cr.App. 1987), cert. denied,
108 S.Ct. 2915 (1988) 13

Creech v. Arave, 928 F.2d 1481
(9th Cir. 1991).....8,9

Earhart v. State, ___ S.W.2d ___
(Tex.Cr.App. Slip Op. No. 70,343
delivered September 18, 1991).....12

Eddings v. Oklahoma, 455 U.S. 104,
102 S.Ct. 869, 71 L.Ed.2d 1 (1982).....4,13

Ford v. Georgia, 498 U.S. ___,
111 S.Ct. 850, 112 L.Ed.2d 935 (1991).....6,7

Franklin v. Lynaugh, 487 U.S. 164,
108 S.Ct. 2320, 101 L.Ed.2d 155 (1989).....12

Hill v. California, 91 S.Ct. 1106,
401 U.S. 797, 28 L.Ed.2d 484 (1971).....7,10

Illinois v. Gates, 462 U.S. 213,
103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).....7,8,10

Lackey v. State, 816 S.W.2d 392
(Tex.Cr.App. 1991).....12

Lewis v. State, 815 S.W.2d 560
(Tex.Cr.App. 1991).....12

TABLE OF AUTHORITIES (Cont'd)

Lockett v. Ohio, 438 U.S. 586,
98 S.Ct. 2954, 57 L.Ed.2d 972 (1978).....4,13

Penry v. Lynaugh, 492 U.S. 302,
109 S.Ct. 2934, 106 L.Ed.2d 256 (1989).....3,4,11,12

Powers v. Ohio, 499 U.S. ___,
111 S.Ct. 1364, 113 L.Ed.2d 411 (1991).....3,5

Trevino v. State, 815 S.W.2d 592
(Tex.Cr.App. 1991).....2,6,8,9,10,11,13

United States v. Versaint, 849 F.2d 827
(3rd Cir. 1988).....9,10

ADDITIONAL AUTHORITY

Article 37.071, V.A.C.C.P.....11

Tex.Civ.Stat. art. 3731a (repealed 1986).....9

Tex.Civ.Stat. art. 3737e (repealed 1986).....9

Fed.R.Evid. 803(8).....9

U.S. Const. amend. VI.....5

U.S. Const. amend. VIII.....8

U.S. Const. amend. XIV.....5

NO. 91-6751

IN THE

SUPREME COURT OF THE UNITED STATES

JOE MARIO TREVINO, *Petitioner*

v.

THE STATE OF TEXAS, *Respondent*

Brief in Opposition to
Petition for Writ of Certiorari to the
Court of Criminal Appeals of Texas

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Respondent respectfully prays that no writ of certiorari issue to review the judgment of the Court of Appeals for the Second Court of Appeals District of Texas.

OPINIONS AND JUDGMENTS BELOW

The Texas Court of Criminal Appeals affirmed Petitioner's conviction on June 12, 1991. Trevino v. State, 815 S.W.2d 592 (Tex.Cr.App. 1991). Judges Clinton and Maloney dissented to the opinion with a note, and Judge Baird did not participate in the Court's decision. Petitioner sought rehearing on three issues; his Motion for Rehearing was denied on September 18, 1991. Mandate issued October 16, 1991.

STATEMENT OF THE CASE

In early 1983, Petitioner raped and murdered eighty-year old Blanche Miller. Petitioner's trial occurred in mid-1984, and a jury convicted him of capital murder. He was sentenced to death by lethal injection. Appeal to the Court of Criminal Appeals was automatic.

SUMMARY OF THE ARGUMENT

Petitioner presents four questions. The first question implicates issues regarding Powers v. Ohio, 499 U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) and Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). For the first time in the appellate process, Petitioner implies that remand for a Batson hearing has been denied him. Although this issue was available prior to the submission of this cause to the court below, this question has not been pressed or passed on and should not now be considered for the first time.

Petitioner's second question focuses on the exclusion of a psychological evaluation. He argues that this ruling constituted a reversible exclusion of mitigating evidence. However, the trial court did not abuse its discretion in excluding this exhibit when Petitioner failed to lay the proper predicate for its introduction.

Petitioner's third question for review raises a straight Penry claim. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Petitioner argues that evidence showing his disruptive childhood home fell outside the scope of the special issues submitted during punishment. The State maintains that this evidence did not rise to the level of that in Penry.

Petitioner's fourth question raises a Penry issue, juxtaposed with the trial court's regulation of *voir dire* examination. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Petitioner complains that the trial court refused to excuse three veniremen whose beliefs were contrary to the mitigation evidence he sought to rely upon during punishment. However, Petitioner improperly attempted to commit these veniremen to a specific finding with respect to their consideration of punishment evidence, and his complaint also relies on a misreading of Eddings v. Oklahoma, 102 S.Ct. 869, 455 U.S. 104, 71 L.Ed.2d 1 (1982) and Lockett v. Ohio, 98 S.Ct. 2954, 438 U.S. 586, 57 L.Ed.2d 972 (1978).

ARGUMENT

- I -

POWERS V. OHIO / BATSON V. KENTUCKY

For the first time, Petitioner appears to request a remand for a Batson hearing. He urges this request under the auspices of Powers v. Ohio, 499 U.S. ___, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) and Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

On direct appeal to the Texas Court of Criminal Appeals, Petitioner voiced a fair cross-section complaint concerning the manner in which his jury was selected. U.S. Const. amend. VI and XIV. Petitioner's brief was filed on December 23, 1985, prior to this Court's decision in Batson. Several months after this Court's opinion in Batson, the State filed its reply brief and a supplemental brief. Both of these State's briefs analyzed the application of this Court's landmark Batson decision to the instant cause. Subsequently, oral argument before the Texas Court of Criminal Appeals and formal submission of this cause occurred on July 2, 1986. See A-1. Although this Court's pronouncements in Batson preceded the submission of this case to that Texas court and despite the fact that both of the State's briefs addressed the newly decided case, Petitioner never requested a remand for a Batson hearing in this cause. The Texas Court of Criminal Appeals correctly determined Petitioner's fair

cross-section argument lacked merit. Trevino, 815 S.W.2d at 598. The Court of Criminal Appeals did not pass on the question of a remand.

In his motion for rehearing, Petitioner assailed the Texas Court's implied determination that his fair cross-section complaint should not be elevated to a Batson - equal protection argument. Again, Petitioner never requested the Court remand the cause for a Batson hearing. Indeed, the State's reply to the request for rehearing specifically pointed out Petitioner's failure to request such a hearing on remand. The State noted that one possible strategic reason for such an omission was the fact that the *voir dire* record showed clear-cut racially-neutral reasons for striking the veniremen in question. In other words, the futility of achieving any relief on the merits of a Batson claim *vis-a-vis* a hearing on remand was evident under the extant record.

Now, for the first time in the appellate process, Petitioner appears to request his cause be remanded for a Batson hearing. While not actually articulating such a request in his petition, he assails the Texas court's failure to order a hearing on remand - even though he has never requested this relief. Pet. for Cert. at p. 14. The State maintains that this request lacks merit.

Petitioner urges this Court to invoke its jurisdiction and implies the need for remand under Ford v. Georgia, 498 U.S. ___, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991). In Ford, this Court

refused to retroactively apply a state rule to procedurally bar the Petitioner's Batson claim when 1) that rule was not in existence at the time of the trial in question and 2) the rule's own authors determined it should only be applied prospectively. *Id.*, 111 S.Ct. at 858. For two reasons, Petitioner's claim lacks merit. First, unlike Ford, our case does not involve the retroactive application of a state procedural rule to bar Petitioner's claim. Petitioner's failure to voice a request for remand is the sole impediment.

A second reason undermines the propriety of Petitioner's request for review. This Court has repeatedly held that questions "not pressed or passed on below" will not be considered. Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 2321-25, 76 L.Ed.2d 527 (1983) (applied to State's failure to challenge the availability of a well-settled federal remedy); Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 1111, 28 L.Ed.2d 484 (1971) (this Court refused to reach a complaint which was not raised, briefed, nor argued in the state appellate court). As evidenced by the State's briefing of this case before the Texas Court of Criminal Appeals, Batson issues were within the realm of contemplation during the pendency of this appeal. Indeed, these issues were alive prior to the original submission of Petitioner's cause before the Court of Criminal Appeals. Petitioner's belated attempt to request such relief should not succeed when this argument was viable months prior to submission of his cause, yet

unaddressed on original submission and even in his motion for rehearing.[1]

While it is not entirely clear whether this rule is jurisdictional or prudential, nevertheless, consideration of Petitioner's newly raised contention would subvert the sound justifications for this rule. Illinois v. Gates, 103 S.Ct. at 2323-24. Therefore, Petitioner's attempted piecemeal litigation of his appellate claim should not prevail. Review should be denied.

- II -

TEXAS YOUTH COUNCIL REPORT

In his second question presented, Petitioner complains that exclusion of the Texas Youth Council Report during the punishment phase of trial constituted a reversible exclusion of mitigating evidence. The Texas Court of Criminal Appeals found Petitioner failed to lay the proper predicate for introduction of this exhibit under the Business Records Act and that the contents of the excluded report were not reliable. Trevino, 815 S.W.2d at 597.

Petitioner cites Creech v. Arave, 928 F.2d 1481, 1488 (9th Cir. 1991), for the premise that a sentencer may rely on

---

1 Clearly, this chronology reveals that this case does not involve a right not recognized. See, Black v. State, ___ S.W.2d ___ (Tex. Crim. App. Slip Op. No. 69,648, delivered May 28, 1991) (mandate issued July 19, 1991).

information from extrinsic sources, including a presentence report which contained statements of mental health practitioners and other hearsay information. Reliance on Creech, however, is misplaced. The defendant in that cause complained of a confrontation violation due to his inability to confront the hearsay declarants. *Id*. Creech is also distinguishable on another basis. The trial judge who sentenced Creech judicially noticed the contents of the presentence report in that cause. *Id*. Creech does not involve the exclusion of evidence proffered by the defense, let alone the exclusion of evidence due to the defense's failure to fulfill the predicate for admission. It cannot control our disposition.

Petitioner also refers us to United States v. Versaint, 849 F.2d 827, 832 (3rd Cir. 1988), and contends that the State failed to make an affirmative showing that the youth council report Petitioner sought to introduce was unreliable. Petitioner fails to acknowledge that Versaint requires such a showing based on the federal business records exception to the hearsay rule. That exception allows admission "unless the sources of information or other circumstances indicate lack of trustworthiness." Fed.R.Evid. 803(8). The business records act applicable to Petitioner's trial did not contain any similar requirement for an affirmative showing of unreliability. Trevino, 815 at 597 n. 1 (quoting Tex.Civ.Stat. art. 3731a and art. 3737e, repealed

September 1, 1986). Therefore, Petitioner's reliance on Versaint is misplaced.

Furthermore, although the Texas business records exception does not place any burden on the State to affirmatively show unreliability, the State undermined any showing of reliability of Petitioner's exhibit when the prosecutor proved the falsity of the certification. R. XXXVI - 834. Moreover, the Texas Court of Criminal Appeals found the proffered exhibit unreliable based upon its double hearsay contents. Trevino, 815 S.W.2d at 597. Thus Petitioner cannot prevail on this issue, even in light of the more stringent federal rule concerning admissibility of business records.

It should also be noted that, for the first time, Petitioner argues that the State failed to make an affirmative showing of the untrustworthiness of the report in question. This question of the State's burden to make such a showing should not be considered because it was "not pressed or passed on below." Illinois v. Gates, 103 S.Ct. at 2321-25; Hill v. California, 91 S.Ct. at 1111. Petitioner's question does not warrant an invocation of this Court's jurisdiction.

- III -

PENRY* - *DISRUPTIVE CHILDHOOD

Petitioner contends that his mitigation evidence fell outside the scope of the special issues submitted at the punishment phase and, therefore, violated this Court's holding in Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989); Article 37.071, V.A.C.C.P. Petitioner specifically argues that evidence of his "disruptive" childhood home constituted Penry evidence and mandated an additional instruction to allow the jury to consider and give effect to this mitigation evidence.

Petitioner's evidence did not constitute proof of significant mitigating potential. The Texas Court of Criminal Appeals correctly determined that Petitioner did not present any Penry evidence. Trevino, 815 S.W.2d at 622. Circumstances are relevant to the mitigation of punishment when they disclose aspects of the defendant's background and character which render that criminal actor less culpable based on society's long-held belief that illegal acts can be attributable to such circumstances. See California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring); U.S. Const. amend. VIII.

As in this case, the Texas Court of Criminal Evidence has previously held that similar evidence fell outside the ambit of Penry evidence. For instance, relying on this Court's opinion in Penry, Judge Baird wrote that evidence of childhood mistreatment

did not rise to the level of Penry evidence. Earhart v. State, ___ S.W.2d ___ (Tex.Cr.App. Slip Op. No. 70,343 at 43, delivered September 18, 1991). Accord Lackey v. State, 816 S.W.2d 392 (Tex.Cr.App. 1991) (turbulent childhood not Penry evidence); Lewis v. State, 815 S.W.2d 560, 567 (Tex.Cr.App. 1991) (vague testimony that the defendant often had bruises and did not have a "happy childhood," unsupported by specific facts, did not raise a *bona fide* mitigation issue).

Unlike the double-edged evidence presented in Penry, this vague evidence could have been given full effect within the submitted issues. See Franklin v. Lynaugh, 487 U.S. 164, 108 S.Ct. 2320, 2330, 101 L.Ed.2d 155 (1989). Petitioner's question for review does not merit further litigation.

- IV -

PENRY - VOIR DIRE CONSIDERATION OF YOUTHFULNESS

Petitioner's fourth question focuses on another aspect of Penry evidence. Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). He contends that three veniremen's "avowed unwillingness" to consider his youth as mitigation evidence violated this Court's requirement that the sentencer be permitted to weigh relevant mitigating evidence of the defendant's background and character.

During *voir dire*, Petitioner sought to commit three veniremen concerning their consideration of youth as a mitigating

factor when assessing punishment. R. XX - 1925-26; XXI - 2213-15; XXII - 2282-83. On direct appeal, the Texas Court of Criminal Appeals correctly determined that the trial court's exclusion of Petitioner's improper attempt to bind these three veniremen to a particular finding without affording them any explanation of the applicable law. Trevino, 815 S.W.2d 599. Jurors are not required to give any particular weight to mitigating evidence in a capital case. Cordova v. State, 733 S.W.2d 175, 189 (Tex.Cr.App. 1987), cert. denied, 108 S.Ct. 2915 (1988) (citing Eddings and Lockett). Contrary to these authorities, Petitioner sought to bind the three veniremen in question to affirmatively consider his youth as mitigation of the death penalty.

Petitioner's contention is based on a misreading of Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) and Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 972 (1978). While these cases require a state's capital murder scheme to permit the defense to introduce any punishment mitigation evidence, these cases do not require the sentencing authority to commit, during *voir dire*, to what facts they will consider as mitigating. Lockett recognized that a capital sentencer "must be ***permitted*** to consider any relevant mitigating factor." Eddings, 102 S.Ct. at 875 (emphasis added). Therefore, the Court of Criminal Appeals correctly overruled Petitioner's point of error; this question does not merit review.

CONCLUSION

Petitioner's trial and conviction do not present facts which necessitate review by this Court. For the above reasons, a Writ of Certiorari to review the decision of the Texas Court of Criminal Appeals would be inappropriate.

Respectfully submitted,

TIM CURRY
Criminal District Attorney
Tarrant County, Texas

C. CHRIS MARSHALL, Assistant
Criminal District Attorney
Chief of the Appellate Section

TANYA SUE DOHONEY, Assistant
Criminal District Attorney
COUNSEL OF RECORD

Tarrant County Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0201
(817) 884-1685
FAX (817) 884-2499

APPENDIX

A-1

IN THE
COURT OF CRIMINAL APPEALS OF TEXAS

JOE MARIO TREVINO

V. NO. 69,337

THE STATE OF TEXAS

June 2, 1986

The above case is set for submission Wednesday, July 2, 1986. Within 15 days from this date, NOTIFY this office whether or not oral argument is desired and advise opposing counsel. Failure to request oral argument within such time constitutes waiver thereof.

Thomas Lowe, Clerk